Nos. 17-1717, 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is an incorporated group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. As adherents of a minority religion, *amicus* has a unique interest in ensuring that Establishment Clause jurisprudence nurtures, rather than stifles, the diversity of religious viewpoints and practices in the United States. To that end, *amicus* urges the Court to repudiate both "offended observer" standing and the "endorsement test" for passive religious displays.

SUMMARY OF ARGUMENT

The decision below exemplifies the error of applying an "endorsement test" to Establishment Clause claims challenging passive displays. *See Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *see also County of Allegheny* v. *ACLU*, 492 U.S. 573, 592-594 (1989) (describing "endorsement" test derived from *Lemon*). The Fourth Circuit held that a nearly century-old memorial commemorating local American servicemen who died in World War I must be destroyed or disfigured because the memorial contains a Latin cross. The court of appeals reached this result by placing dispositive weight on its conclusion that an imagined "reasonable observer" would view the memorial as "endors[ing] Christian-

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[1] No counsel for a party authored this brief in whole or in part. Nor did counsel for a party, a party, or anyone other than the amicus curiae or its counsel make a monetary contribution intended to fund the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

ity—not only above all other faiths, but also to their exclusion." Pet. App. 26a.[2]

Cases like this are precisely why the Court's recent decisions have shunned *Lemon*'s endorsement test and why the test should be finally repudiated. In *Town of Greece* v. *Galloway*, the Court instructed that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 572 U.S. 565, 576 (2014) (quotation marks omitted). That decision followed other recent cases in which the Court properly ignored *Lemon* in assessing Establishment Clause claims. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (explaining that the *Lemon* test is "not useful in dealing with" passive monuments); *id.* at 699 (Breyer, J., concurring) (noting that "no single mechanical formula ... can accurately draw the constitutional line in every" Establishment Clause case). Consistent with *Town of Greece*'s focus on historical practices and understandings, the Court should hold that the touchstone of Establishment Clause analysis is government *coercion* of religious belief or practice and that passive displays such as the Peace Cross are presumptively valid.

The endorsement test applied by the court below reflects a hostile stance toward religious symbols in public life—contrary to this Court's admonition that the Constitution does not "oblige government to avoid any public acknowledgement of religion's role in society" or "require eradication of all religious symbols in the public realm." *Salazar* v. *Buono*, 559 U.S. 700, 718-

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[2] All Pet. App. citations are to the Appendix to the American Legion's petition in No. 17-1717.

719 (2010) (plurality opinion). Continued use of the endorsement test poses risks for religious minorities, whose symbols and practices may more readily be viewed as "sectarian" to a "reasonable observer" regardless of context, and who often rely on governmental acknowledgement or accommodation to flourish. A test that scrutinizes such accommodations for any hint of "endorsement" undermines religious liberty.

The endorsement test has also distorted standing requirements under the Establishment Clause. If a perceived "endorsement" of religion represents an Establishment Clause violation, then merely taking offense at that endorsement might be sufficient to show Article III injury. In fact, the court below determined that Respondents' taking offense at seeing the Peace Cross established standing to sue. Nowhere else in American law does this type of abstract injury support standing. And this Court has rejected any special test for standing in Establishment Clause cases. *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982). There is no justification for making religious Americans uniquely vulnerable to lawsuits. Overruling the endorsement test as having no basis in the Constitution and replacing it with a test focused on coercion would restore proper Article III standing analysis in Establishment Clause litigation.

ARGUMENT

I. THIS COURT SHOULD ADOPT A COERCION ANALYSIS FOR PASSIVE DISPLAYS OF RELIGIOUS SYMBOLS

"Like some ghoul in a late-night horror movie," *Lemon* continues to stalk Establishment Clause jurisprudence, *see Lamb's Chapel* v. *Center Moriches Union*

Free School District, 508 U.S. 384, 398 (1993) (Scalia, J., concurring), and the Court should bury it for good. This case highlights why *Lemon*'s endorsement test is incompatible with historical practices and understandings under the Establishment Clause. The Court should replace that extra-constitutional test with a clear constitutionally-mandated rule for Establishment Clause challenges to passive displays: When a government displays religious symbols non-coercively—consistent with "the rich American tradition of religious acknowledgements," *Van Orden*, 545 U.S. at 690 (plurality opinion)—the display is presumptively valid. Adopting this analysis would end years of jurisprudential uncertainty and stop the abuse of the Establishment Clause to purge religious acknowledgments, including those of minority religions, from the public square.

A. Establishment Clause Analysis Should Focus On Coercion, Consistent With Historical Practices And Understandings

Shortly after *Lemon* was decided, this Court noted that its factors are "no more than helpful signposts" for an Establishment Clause analysis. *Hunt* v. *McNair*, 413 U.S. 734, 741 (1973). After all, "the purpose of the Establishment Clause was to state an objective, not to write a statute." *Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970)). Cases that attempted to reduce *Lemon*'s "helpful signposts" to a rigid test only demonstrated that the signposts actually offered no help at all and led to inconsistent results. *Compare Everson* v. *Board of Educ.*, 330 U.S. 1 (1947) (permitting a state to provide bus transportation to a parochial school), *with Wolman* v. *Walter*, 433 U.S. 229 (1977) (precluding a state from

providing bus transportation for parochial school field trips); *see also Aguilar* v. *Felton*, 473 U.S. 402, 430 (1985) (O'Connor, J., dissenting) (explaining that these "anomalous" results stemmed from "the theory that [field] trips involve excessive state supervision of the parochial officials who lead them").

Given the inadequacy of *Lemon*'s framework, and in particular the "endorsement test," this Court has rightly shunned *Lemon* in recent years. In the 2005 *Van Orden* decision, a majority of the Court declined to apply *Lemon* in upholding a Ten Commandments display on the Texas State Capitol grounds. The plurality explained that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected." 545 U.S. at 686 (plurality opinion); *see also id.* at 699 (Breyer, J., concurring) (declining to apply *Lemon* because "no single mechanical formula ... can accurately draw the constitutional line in every" Establishment Clause case). Instead, the plurality noted, the analysis should be "driven both by the nature of the [challenged action] and by our Nation's history." *Id.* at 686 (plurality opinion).

Cases after *Van Orden* charted a similar course, resolving Establishment Clause claims based on historical understandings and practices rather than the *Lemon* framework. In *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, the Court did not cite *Lemon* at all, and instead conducted an extensive historical analysis to conclude that the Establishment Clause supported a ministerial exception to employment discrimination suits. *See* 565 U.S. at 182-185. Similarly, the Court eschewed *Lemon* in upholding the practice of an opening prayer at town council meetings

in *Town of Greece*, noting that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 572 U.S. at 576 (quotation marks omitted). The Court's analysis emphasized the issue of coercion, explaining that "[i]t is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise." *Id.* at 586 (quotation marks omitted). In deeming the prayer constitutional, the decision looked to the history of legislative prayer and early congressional recognition that the practice "posed no threat of an establishment" of religion so long as no one was compelled to pray, "no faith was excluded by law, nor any favored," and the prayers imposed a "small burden on taxpayers." *Id.* at 576-577.

These cases reflect the Court's *de facto* abandonment of the "endorsement test," in favor of an analysis focused on coercion and informed by "historical practices and understandings." *Elmbrook Sch. Dist.* v. *Doe*, 134 S. Ct. 2283, 2284-2285 (2014) (Scalia, J., dissenting from denial of certiorari) (quoting *Town of Greece*, 572 U.S. at 576 (quotation marks omitted)); *see also Town of Greece*, 572 U.S. at 603 (Alito, J., concurring) ("[I]f there is any inconsistency between [a 'test' set out in the opinions of this Court] and ... historic practice ..., the inconsistency calls into question the validity of the test, not the historic practice.").

The decision below bears no resemblance to this Court's approach and only highlights *Lemon*'s errors. The Fourth Circuit applied the abandoned endorsement test to conclude that a nearly century-old memorial to forty-nine soldiers who lost their lives in World War I is a "sectarian" display that "endorses Christianity ... not only above all other faiths, but also to their exclusion." Pet. App. 26a. Absent from the lower

court's analysis is any focus on whether the memorial is properly viewed as coercive considering historical practices and understandings. The court conducted no meaningful review of the history of cross displays or similar displays of religious symbols in memorials to U.S. war veterans, on military medals, or in commemorations of the First World War. It dismissed comparable displays at Arlington National Cemetery as "much smaller" than the Bladensburg Memorial and dismissed the display of the cross or the Star of David on individual headstones at Arlington as irrelevant. *See* Pet. App. 26a-27a. And it brushed aside evidence of the commemorative purposes of the Peace Cross as a symbol of sacrifice in the First World War. *See* Pet. App. 98a; *see also* H.R. Res. 16, 68th Cong. 1 (1924) (recognizing that crosses were "peculiarly and inseparably associated" with the American lives lost in World War I). This historical evidence was given virtually no weight against the imagined casual observations of the lower court's "reasonable observer," who "could not help but note that the Cross is the most prominent monument in [Veterans] Park and the only one displaying a religious symbol." Pet. App. 26a.

The Fourth Circuit's application of *Lemon* also fell back on the ahistorical metaphor of a "wall between church and state that 'must be kept high and impregnable.'" Pet. App. 19a (quoting *Everson*, 330 U.S. at 18). This Court, however, has consistently recognized that our Nation has a history of acceptable and even desirable commingling of religion and civic life. *See, e.g.*, *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 212 (1963) ("[R]eligion has been closely identified with our history and government."); *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) ("[T]he Establishment Clause does not compel the government to

purge from the public sphere all that in any way partakes of the religious. Such absolutism is ... inconsistent with our national traditions[.]" (citation omitted)). The First Amendment does not require banishment of religion from the public square. *See Lynch*, 465 U.S. at 673 ("The concept of a 'wall' of separation is a useful figure of speech ... [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."); *Committee for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 760 (1973) ("It has never been thought either possible or desirable to enforce a regime of total separation [of church and state]."). [3] The Fourth Circuit's application of *Lemon* was incompatible with this historical reality.

In short, decisions like the one below are the natural and expected result of *Lemon*. Without proper focus on coercion in historical context, almost any civic display or government accommodation of religion might be deemed "endorsement" or "entanglement," and fail under *Lemon*. But "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 690 (plurality opinion). This Court should reverse the Fourth Circuit and hold that *Lemon* is inapplicable to passive governmental displays and acknowledgements of religion. The proper analysis in light of our Nation's historical practices and under-

[3] To this end, the Court has consistently approved government programs that intersect with religion. For instance, the Court recently mandated the inclusion of churches in government funding schemes. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017). The Court has also upheld voucher programs that include schools affiliated with religious denominations. *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002).

standings is whether such displays and acknowledgements coerce religious belief or exercise.

B. The Endorsement Test Poses Particular Risks For Religious Minorities

Among the many reasons to repudiate the endorsement test is the risk the test poses for minority religions. In focusing on whether a "reasonable observer" perceives endorsement in a religious display, *Lemon* is unduly hostile to unfamiliar religious displays that may be more readily viewed as sectarian. The same is true for certain governmental accommodations of minority religions, on which many religious communities depend to participate and flourish in civic life and which risk being viewed as a sectarian endorsement under *Lemon*.

1. The "reasonable observer" framework threatens religious minorities

According to the Fourth Circuit, the imaginary reasonable observer weighs a display's sectarian content against its secular content to determine whether the acknowledgement "'conveys a message of endorsement ... of a religion.'" Pet. App. 17a. This presents a particular problem for religious minorities.

Certain acknowledgements of religious practices and symbols, such as the display of a Latin cross, are sufficiently common to have "evol[ved] ... through the centuries" and taken on a "secular rather than [] a religious character." *McGowan* v. *Maryland*, 366 U.S. 420, 444 (1961). The reasonable observer who is "aware of the history and context of the community and forum," *Capital Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring), consid-

ers such developments. But secularized religious acknowledgments derive primarily from the majority religion: Christianity. *See, e.g., Lynch*, 465 U.S. 668 (upholding a crèche display erected as part of a Christmas display). Familiar acknowledgements of Christianity are therefore more likely to be viewed as secular. *See, e.g., Salazar* v. *Buono*, 559 U.S. 700, 715-716 (2010) (plurality opinion) (describing a Latin cross on government land as memorializing fallen soldiers rather than retaining its Christian symbolism); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 601 (1989) (plurality opinion) (noting that the government recognizes Christmas as a "cultural phenomenon," not as a holy day celebrating the birth of Jesus). The symbols and practices of minority religions are inherently less familiar, and their religious connotations are more pronounced. And while some elements of the Jewish faith may have become secularized, *see Van Orden*, 545 U.S. 677 (Ten Commandments); *County of Allegheny*, 492 U.S. at 613 (Menorah),[4] less familiar Jewish religious items and symbols such as the mezuzah or sukkah retain their distinctly religious character. The "reasonable observer" analysis is more likely to treat such symbols as inherently sectarian.

The endorsement test thus conjures the specter of disparate treatment of religious minorities. This is not a hypothetical concern. For example, while Sunday closing laws, acknowledging the day of rest for most Christians, do not offend the Establishment Clause, *McGowan*, 366 U.S. at 444, a law prohibiting fraud in the sale of kosher food products does, according to the Fourth Circuit, *Barghout* v. *Bureau of Kosher Meat &*

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[4] *But see Ritell* v. *Village of Briarcliff Manor*, 466 F. Supp. 2d 514, 525 (S.D.N.Y. 2006) (disallowing a large menorah display).

Food Control, 66 F.3d 1337, 1346 (4th Cir. 1995) (holding that kosher fraud ordinance has "the primary effect of ... endorsement of the Jewish faith" because "[n]o other particular type of consumer fraud is singled out for separate treatment"). And in *Town of Greece*, the respondents asked this Court to permit only "nonsectarian" legislative prayers. Resp't Br. 53, *Town of Greece* v. *Galloway* No. 12-696 (U.S. Sept. 16, 2013). A prayer to "God" would have been considered "nonsectarian," but references to the gods of minority religions—and even uses of the various names of the Abrahamic God, such as "Hashem"—would likely have been prohibited. *See id.* ("[A] prayer to God is plainly more inclusive than one to 'Jesus' or 'Allah.'"); Oral Arg. Tr. 46-50 (Nov. 6, 2013). The Court rightly rejected the respondents' position, but that the argument was even made demonstrates the perils of relying on a "reasonable observer's" arbitrary judgment of what counts as a "sectarian" acknowledgement.

In privileging familiar forms of religious expression, *Lemon*'s reasonable observer approach risks fostering distrust, suspicion, and even hostility to religious minorities. As such, the *Lemon* test runs counter to America's history of welcoming religious minorities. *See, e.g.*, Letter from George Washington to Newport Hebrew Congregation (Aug. 18, 1790), *in* 6 *Papers of George Washington* 285 (M. Mastromarino ed. 1996) ("All possess alike liberty of conscience and immunities of citizenship."). It fails to recognize the particular concerns and perspectives of minority religious communities who thrive in our common civic life, and whose religious symbols properly belong in our communities' shared expressions of public meaning. Our Nation rightly "acknowledges our growing diversity not by

proscribing sectarian content but by welcoming ... many creeds." *Town of Greece*, 572 U.S. at 579.

Recently Jews have faced a variety of legal and governmental attempts to constrain their religious practices. For instance, before two recent Yom Kippurs, animal-rights activists brought suits to curtail the killing of chickens in Day of Atonement rituals. *See, e.g.*, Complaint, *United Poultry Concerns* v. *Chabad of Irvine*, No. 16-01810 (C.D. Cal. Sept. 29, 2016); Complaint, *Animal Protection & Rescue League, Inc.* v. *Chabad of Irvine*, No. 30-2015-00809469-CU-BT-CJC (Super. Ct. Orange Cty. Sept. 11, 2015). Two years ago, a group of plaintiffs in Florida argued that granting a zoning variance to build a synagogue violated the Establishment Clause. *See Gagliardi* v. *TJCV Land Trust*, 889 F.3d 728 (11th Cir. 2018). Four years ago, New York attempted to fine Orthodox Jewish stores that posted a request for customers to dress modestly. *See* Berger, *No Fines for Stores Displaying a Dress Code*, N.Y. Times, Jan. 21, 2014, https://nyti.ms/2SpK7T1. And one year earlier, a New York City Orthodox Jewish probationary policeman had to seek the protection of a federal court after he was forced to resign over department facial-hair regulations.[5] *See Litzman* v. *New York City Police Dep't*, 2013 WL 6049066, at *1 (S.D.N.Y. Nov. 15, 2013).

Although these attempts to constrain Jews in their public religious practice have largely been resolved in favor of religious liberty, they reflect a troubling effort to purge religious symbolism and practice from the public realm. This secularizing force—this "brooding

[5] Some believe the prohibition in Leviticus 19:27 against shaving extends to all forms of shaving, and thus have no means of closely trimming their facial hair.

and pervasive devotion to the secular and ... passive, or even active, hostility to the religious," *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring)—threatens the public religious practices of all religious minorities, not just Jews. And these concerns are exacerbated by the essential arbitrariness of the "reasonable observer" test. As Justice Scalia observed, since its inception, the *Lemon* test has been "manipulated to fit whatever result the Court aimed to achieve." *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting); *see also Lynch*, 465 U.S. at 699 n.4 (Brennan, J., dissenting) ("It seems the Court is willing to alter its analysis from Term to Term in order to suit its preferred results."). This Court should neutralize that threat by returning to a proper historically-rooted understanding of the Establishment Clause.

2. Minority religious communities rely on governmental accommodation and acknowledgment

Minority religious communities are particularly dependent on accommodations or acknowledgments from the government to facilitate their religious practice. But a legal culture that views the presence of religion in the public square as an impermissible "sectarian" establishment is unlikely to value preserving space for religious minority practices or to be moved by requests for accommodation or acknowledgment.

Despite perceived tension between the Establishment Clause and religious accommodation, this Court has long recognized the validity of state accommodation of religious practices. *See, e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 627-628 (1992) (Souter, J., concurring) ("The State may 'accommodate' the free exercise of religion by relieving people from generally applicable rules that

interfere with their religious callings. Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief." (citations omitted)). And this Court has long embraced government accommodation of religion, going so far as to praise it as "the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314-315 (1952) (religious accommodation "respects the religious nature of our people and accommodates the public service to their spiritual needs"). Religious minorities rely on the government's authority to provide tailored religious accommodations consistent with the Establishment Clause.[6]

Practitioners of Judaism have sought government accommodations for a variety of religious practices, from physical movement on the Sabbath, to Kosher meals, to observance of Jewish holidays. A notable example is the eruv, which is a visible, physical, "ceremonial demarcation of an area" typically constructed by enclosing a section of a town by hanging wires on preexisting municipal utility poles. *See Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 152 (3d Cir. 2002). According to Jewish law, adherents may not carry objects—including keys, strollers, food, and children—outside their private residences on the Sabbath, but they may carry freely within the area enclosed by an eruv, which facilitates their journey to and from

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[6] Indeed, applying the Establishment Clause to invalidate religious accommodations would undermine the Free Exercise Clause, which is "specially concerned with the plight of minority religions." Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1159 (1991). Limiting accommodations of religious minorities would thus have the perverse outcome of threatening the very communities the Free Exercise Clause was intended to protect.

synagogue on the Sabbath. In efforts to accommodate the Jewish religious minority, numerous municipal governments have approved construction of eruvs within their city limits. Levin, *Rethinking Religious Minorities' Political Power*, 48 U.C. Davis L. Rev. 1617, 1630 (2015) (noting that there are more than 130 eruvs in the United States). Although eruvs are indistinguishable from standard utility wiring, *Tenafly*, 309 F.3d at 152, they have sometimes been viewed with suspicion by individuals who have challenged their constitutionality based on their being "made uncomfortable" by the presence of an eruv. *Jewish People for Betterment of Westhampton Beach* v. *Village of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) (per curiam) (plaintiffs alleged that the eruv was a "constant and ever-present symbol, message, and reminder to the community at large, that the secular public spaces of the Village have been transformed for religious use and identity" (quotation marks omitted)). Such challenges may cause municipal governments to think twice about allowing Jews to construct eruvs. When coupled with the lax standing requirements lower courts erroneously apply in Establishment Clause cases, *see infra* Part II, this amounts to giving any person a heckler's veto over Jewish communal life.

The litigation roulette wheel that is the *Lemon* test may discourage governments from providing other reasonable accommodations. For instance, while religious holidays like Christmas are already excused for all federal employees, followers of Judaism require government accommodation to celebrate holidays like Sukott and Passover, as well as lesser known holidays like Purim. And Jewish servicemembers and Jewish attendees of state-sponsored conferences need government accommodations of Kosher dietary provisions.

Jews and adherents of other minority faiths also rely on governmental acknowledgment of their religious symbols and practices to ensure that they are welcome in the broader community. For instance, governments at all levels have long celebrated Hanukkah with overt acknowledgements of Jewish symbolism and practices. The President holds an annual Hanukkah party at the White House, during which he and other government officials discuss the religious origins of the holiday and participate in the lighting of the menorah. *See, e.g.*, Wilner, *Instead of One, Trump to Hold Two Hanukkah Parties This Year*, Jerusalem Post, Nov. 8, 2018, https://bit.ly/2QaQvRB; Mozgovaya, *Bush Cuts Short Mideast Trip to Host White House Hanukkah Party*, Haaretz (Dec. 16, 2008), https://bit.ly/2UcmUW4. As President George W. Bush noted in 2001, the lighting of the menorah sends a powerful message that the White House is "the people's house, and it belongs to people of all faiths." *Hanukkah Menorah Lighting*, C-SPAN, Dec. 20, 2001, https://cs.pn/2Q6XVFi.

Since 1979, the federal government has allowed the Chabad group American Friends of Lubavitch to erect the thirty-foot-high National Menorah on The Ellipse in Washington, D.C. every year. Cohen, *Rabbi lights the way for the National Menorah event at Hanukkah*, Wash. Post, Dec. 7, 2012, https://wapo.st/2Sp5CUd. And in 2004 governors from all 50 states issued proclamations or statements of congratulations to mark the National Menorah's 25th anniversary. *Proclamations*, National Menorah, https://nationalmenorah.org/proclamations (visited Dec. 20, 2018). In the words of one of the National Menorah's original organizers, the display

"show[s] that Jews [can] raise their heads up without fear." Cohen, *supra*.[7]

These displays are not limited to temporary holiday displays; there are also many permanent displays (akin to the Peace Cross) that incorporate Jewish symbols. For example, various Holocaust remembrance memorials incorporate Jewish symbols like the Star of David, Torah scroll, or menorah. These include the Holocaust Monument in Columbia, South Carolina and the New England Holocaust Memorial in Boston. The latter consists of "six luminous glass towers, each reaching 54 feet high, and each lit internally from top to bottom," meant to invoke the candles of a menorah while representing the six million Jews murdered in the Holocaust. The New England Holocaust Memorial, https://bit.ly/2G4ZcIq (visited Dec. 20, 2018); *see also* South Carolina Memorial Park, https://bit.ly/2rw7tuO (visited Dec. 20, 2018). In addition, Stars of David are engraved on the tombstones of fallen American soldiers in Arlington National Cemetery.

The endorsement test interferes with all such attempts to accommodate religious symbols and practices in our shared public life. Far from vindicating Establishment Clause principles, the endorsement test legitimizes the assumption that public religious acknowledgments or accommodations are a departure from the

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[7] Similarly, in 2015 Maryland Governor Larry Hogan visited an Orthodox synagogue to engage in a ritual purchase of chametz: certain grain-based foods that Jews are not permitted to own during Passover. *See* Samantha S., *Governor Larry Hogan Visits Beth Tfiloh to Buy Chametz* (Mar. 30, 2015), http://bit.ly/2HpmB2Y. It has become a tradition to sell chametz to non-Jews and repurchase it after the holiday. The Governor's participation fostered public understanding of a practice that is unfamiliar to many.

norm—from the accepted, "secular" character of civic life. That assumption would, in effect, enshrine secularism as our common state religion. But there is no basis for it: nothing in the Constitution "oblige[s] government to avoid any public acknowledgement of religion's role in society" or "require[s] eradication of all religious symbols in the public realm." *Buono*, 559 U.S. at 718-719 (plurality opinion). Because religious minorities depend on governmental accommodations that are perfectly consistent with the plain meaning of the Establishment Clause, this Court should resolve beyond any doubt that such accommodations are constitutionally permissible.

II. The Endorsement Test Distorts Standing Analysis In Establishment Clause Litigation

The endorsement test has another pernicious consequence: it distorts constitutional standing analysis in Establishment Clause cases. Lower courts have improperly assumed that a plaintiff who merely takes offense at a perceived government endorsement of religion suffers a cognizable injury. Thus, in the case below, the court held that Respondents had Article III standing based on the vague and abstract "offense" they felt when driving by the Peace Cross. That alleged "harm" falls well short of the injury normally required to sue in federal court, and there is no basis to apply a special rule in Establishment Clause cases. Doing so makes religious Americans uniquely vulnerable to lawsuits, a situation that cannot possibly be justified by the text of the First Amendment. Indeed, this Court has repeatedly rejected the expansive view of standing adopted by the court below.

The essential requirement of Article III standing is clear. "No principle is more fundamental to the judici-

ary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (quoting *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997)). "[S]tanding is an essential and unchanging part" of Article III's case-or-controversy requirement. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing requires a plaintiff to establish an "injury in fact" that is "fairly ... traceable to the challenged [conduct] of the defendant." *Id.* (quotation marks omitted).

Among these essential elements, the obligation to establish an injury that is "'concrete'" and "'actual or imminent'" stands "'[f]irst and foremost.'" *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1547-1548 (2016) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998)). As this Court recently reiterated in *Spokeo*, standing is not triggered merely by a plaintiff's insistence on psychic harm. *Id.* Rather, an "injury must be 'de facto'; that is, it must actually exist." *Id.* at 1548. Moreover, the "presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself" to meet Article III's requirements. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986); *see also Hollingsworth* v. *Perry*, 570 U.S. 693, 700 (2013) ("[I]t is not enough that the party invoking the power of the court have a keen interest in the issue.").

The decision below shows how far these requirements have been diminished to accommodate *Lemon*'s endorsement framework. The court of appeals held that three individuals had standing to sue simply because they "regularly encountered the Cross ... while

driving" and were "offended" by its display.[8] Pet. App. 7a, 10a-11a. In the court's view, pleading mere "unwelcome direct contact with a religious display" sufficed to establish standing. Pet. App. 10a (quotation marks omitted).

That analysis is contrary to the Court's repeated admonitions that standing requires more than abstract psychic "harm," and that there is no special test for standing in Establishment Clause cases. *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982); *see also, e.g., Allen* v. *Wright*, 468 U.S. 737, 755-756 (1984) (rejecting standing based on "abstract stigmatic injury" in Equal Protection Clause context). As *Valley Forge* observed, "psychological consequence ... produced by observation of conduct with which one disagrees ... is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." 454 U.S. at 485-486. Even in the Establishment Clause context, neither the degree of the plaintiffs' "offense," nor the mental pain "produced by observation of conduct with which [they] disagree[d]," substitutes for the showing of cognizable injury required for Article III standing. *Id.* at 485.

Nor is the Fourth Circuit alone in having relaxed standing requirements for Establishment Clause plaintiffs. Lower courts have repeatedly and improperly allowed standing predicated solely on the basis that a plaintiff was "offended" by public religious expression

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[8] The Fourth Circuit also held that the American Humanist Association had standing solely because some of its members "faced unwelcome contact with the Cross." Pet. App. 11a.

or symbolism.[9] And nearly all courts of appeals now consider any "direct contact"—no matter how ephemeral—with an "offensive" display sufficient for Article III standing. The upshot is a significant docket of federal lawsuits seeking to eradicate public religious acknowledgements and accommodations.[10] The mere threat of such lawsuits may be sufficient to act as a heckler's veto and intimidate local governments into declining reasonable accommodations to members of minority religions.

Repudiating the endorsement test is a first step in restoring proper Article III requirements to Establishment Clause cases. An analysis focused on coercion of religious belief or practice is far less suited to vague allegations of psychic harm, and will tend to reinforce the Article III requirement of a direct and concrete injury.[11] At a minimum, in deciding this case, the Court

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[9] *See, e.g.*, *New Doe Child #1* v. *Congress of U.S.*, 891 F.3d 578, 585-586 (6th Cir. 2018); *American Humanist Ass'n* v. *Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243, 1250-1252 (10th Cir. 2017); *Freedom from Religion Found. Inc.* v. *New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476-480 (3d Cir. 2016); *Westhampton Beach*, 778 F.3d at 394-395; *Red River Freethinkers* v. *City of Fargo*, 679 F.3d 1015, 1023-1024 (8th Cir. 2012); *Catholic League for Religious & Civil Rights* v. *City & Cty. of San Francisco*, 624 F.3d 1043, 1052-1053 (9th Cir. 2010); *Pelphrey* v. *Cobb Cty.*, 547 F.3d 1263, 1279-1280 (11th Cir. 2008); *Books* v. *City of Elkhart*, 235 F.3d 292, 300-301 (7th Cir. 2000).

[10] Expansive standing also opens the door wide to lawsuits challenging the various governmental accommodations of minority religious practices described above. *See supra* Part I.B.

[11] To be sure, direct and concrete harm might involve some psychological elements. But coercion transcends mere psychological offense. *See Town of Greece*, 572 U.S. at 589 ("Offense ... does not equate to coercion.") (plurality opinion). Because Plaintiffs

should make clear that there are no special standing rules for Establishment Clause litigants, and that federal courts must attend to Article III standing requirements in Establishment Clause cases just as in other litigation. Religious Americans should not be uniquely vulnerable to harassment by litigation when they choose to participate in the public square.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

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claim only offense, not coercion, their alleged psychological harm is not a cognizable Article III injury.